

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Michael Fink,)
)
Plaintiff,) Court File No.
) 1:20-CV-222
vs.)
)
BNSF Railway Company, a)
corporation,)
)
Defendant.)

REMOTE DEPOSITION
OF
MICHAEL FINK

DATE: Thursday, March 10, 2022
PLACE: Veritext Virtual Zoom
BY: Charla A. Pawlik, RPR

<p style="text-align: right;">Page 22</p> <p>1 example. Maybe this will help. So at Corporate 2 Technologies their main focus was cold calling. So 3 the job was to make as many cold calls as you could 4 every day and set as many appointments as you could, 5 and then you'd go out and meet with the business 6 owner and discuss IT services with them. But they 7 had specific matrix that you needed to hit in order 8 to be considered that you were doing your job, if you 9 will. 10 Same was true with Integra 11 Telecommunications. The same was true with 12 Pitney Bowes. With RDO Equipment there were -- it 13 was a -- it was more of a revenue based on the number 14 of sales that were coming in. I didn't -- it 15 wasn't -- I didn't go get my own business per se. 16 And prior to that, you know, when I -- when I oversaw 17 the accounts receivable team, that was all based on 18 those same kind of logical activity requirements, if 19 you will, as well. 20 Q. Sure. So there were -- 21 A. I don't know if that answers your 22 question. Sorry. 23 Q. Go ahead. No, that -- that -- that's 24 helpful. There were -- there were guidelines and 25 expectations as to your productivity --</p>	<p style="text-align: right;">Page 24</p> <p>1 Q. Okay. 2 A. At the -- well, at the same time I did 3 have a -- a real estate rental company as well, but I 4 sold out of those assets also around that same time 5 frame with the exception of renting out the house I 6 was living in in Fargo for a little while after my 7 family moved to Bismarck. 8 Q. Okay. Got it. So on the side while 9 you had these other jobs going on, at some point you 10 owned some rental properties? 11 A. Yes. 12 Q. And then sold those and then had your 13 house in Fargo also before you moved to Bismarck? 14 A. Right. 15 Q. In any of those either in your private 16 life or in your business life or in your life as a -- 17 a landlord, did you ever have any prior lawsuits? 18 A. I did have to evict a tenant at one 19 point. 20 Q. And that was just a fact of life when 21 you're a landlord; sometimes tenants don't pay rent? 22 A. Yeah, they -- they didn't pay rent. I 23 tried to work with them. They still didn't make good 24 on rent and so an eviction was -- was issued. 25 Q. Okay. Any -- any other lawsuits that</p>
<p style="text-align: right;">Page 23</p> <p>1 A. Yes. 2 Q. -- in those sales roles; is that what 3 you're saying? 4 A. Absolutely. 5 Q. Okay. Understood. All right. And 6 then you mentioned a couple times that National 7 Corporation -- National Capital Solutions Corporation 8 just kind of never took off; is that right? 9 A. That's correct. 10 Q. And -- and what year did that kind of 11 wrap up? 12 A. Well, officially I was done with it 13 when I hired out on the railroad. 14 Q. Got it. 15 A. So my -- 16 Q. What's your date of service? 17 A. August I think 19th of 2013. 18 Q. Okay. 19 A. August of 2013. I might be wrong on 20 the date. 21 Q. No, that's fine. I -- I'm sure we have 22 that information somewhere and we can look that up. 23 But it's -- once you started at BNSF you were done 24 with your private company? 25 A. Yes.</p>	<p style="text-align: right;">Page 25</p> <p>1 you can recall? 2 A. Oh, not that I remember. 3 Q. And this is -- might sound like a 4 left-field question, but I tend to ask it in most of 5 our depositions. But have you ever been charged with 6 a felony or a crime involving dishonesty? 7 A. No. 8 Q. All right. So you mentioned that your 9 seniority date is August 2013 at BNSF. At the -- how 10 did you come to decide to apply for employment at 11 BNSF? 12 A. Actually my -- my uncle, Mark Goodson, 13 was working as a dispatcher for BNSF. And called me 14 up one day and said that they were looking for people 15 in North Dakota, and he asked if I knew anybody that 16 would be interested. I don't think he had any 17 intention of me being interested when he called me. 18 And when I talked to him a little bit more about it, 19 at the time I was looking for something completely 20 different than what I was doing before and so I 21 thought I'd give it a try. 22 Q. Why were you looking for something 23 completely different? 24 A. Well, I was just looking for something 25 that was more stable than a commission-based job.</p>

<p style="text-align: right;">Page 58</p> <p>1 A. It wasn't necessarily a requirement for 2 the job. Although there are times that a job like 3 this would have a brakeman so it's very possible that 4 you could have three crew members. Typically you 5 would have an engineer, a conductor and a brakeman or 6 just an engineer and a conductor. It is unusual that 7 you would have an engineer and two conductors. 8 However, my understanding was that since Carroll had 9 just passed his certification exam and he couldn't 10 hold a job based on his seniority that the railroad 11 didn't want to furlough everyone out of that class so 12 they were letting them work as conductors -- as an 13 additional conductor essentially. 14 Q. Okay. All right. All right. So you 15 guys go through your work, and at some point you 16 determine you need to go to Jamestown -- 17 A. Yes. 18 Q. -- that work was to be done? What are 19 you going to do in Jamestown? Are you picking up an 20 engine, cars? What are you doing? 21 A. Picking up an engine, yes. 22 Q. All right. And can you kind of walk me 23 through your -- well, I guess any -- anything notable 24 about the trip from Mandan to the Jamestown yard? 25 A. No.</p>	<p style="text-align: right;">Page 60</p> <p>1 the only -- I guess that was one unique thing that 2 happened that day. 3 Q. All right. Who did you speak with 4 about this inbound train inspection rule? 5 A. The yardmaster. 6 Q. Do you remember who the yardmaster was? 7 A. Her name is Dee. I don't know her last 8 name. 9 Q. D-e-e? 10 A. D-e-e, correct. 11 Q. She's a female yardmaster in Mandan? 12 A. That's correct. 13 Q. Okay. And she said, "I'm a yardmaster. 14 You need to talk to the road foreman"? 15 A. Right. 16 Q. Did you talk to the road foreman? 17 A. Not until the next morning. 18 Q. Who would the road foreman have been at 19 the time? 20 A. Justin Selzler. 21 Q. All right. And I'll -- I have some 22 questions about that. I'll come back to that. 23 But -- 24 A. Okay. 25 Q. -- your testimony is you spoke to Dee</p>
<p style="text-align: right;">Page 59</p> <p>1 Q. When you get to the yard limits, do you 2 stop and -- and check in with anybody or do you just 3 go about your tasks? 4 A. It's -- it's yard track, not yard 5 limits. Yard limits is a specific railroad term. 6 But so we stopped on -- it's Main 1 and Main 2 in 7 Jamestown. There are two main tracks there. I don't 8 remember which main track we were on. We would have 9 been on the one -- I believe we were on the one 10 further to the north, the north track. 11 The -- so we -- we stopped -- actually 12 there was -- before we left the yard office -- let me 13 back up. There was a new general order that we 14 discussed. A general order, a notice of some sort 15 that we discussed. When we were in the yard office I 16 brought it up to the yardmaster, Dee... I don't 17 remember her last name at the moment. 18 They had changed the rule to require 19 inbound train inspection. Any time you were... 20 Well, any time you were... The rule is called the 21 inbound train inspection rule. They were using it 22 for outbound trains. I told her that -- that that 23 was problematic. And she suggested that she didn't 24 have any control over it and that I should take it up 25 with the road foreman of engines so... So that was</p>	<p style="text-align: right;">Page 61</p> <p>1 that morning before you left the yard. Was that in 2 person or over the radio or on the phone or -- or 3 what? 4 A. That was in person in her office. 5 Q. And do you know when that inbound train 6 rule went into effect? 7 A. I believe it went into effect either 8 the day before or that day. It was -- it was a 9 recent change. 10 Q. All right. And I'll circle back to 11 that. Let me make a -- 12 A. Okay. 13 Q. -- note here just to make sure I hit 14 that. I want to just keep with the narrative on 15 February 5th. 16 A. Okay. 17 Q. You get to the yard -- 18 A. We get to Jamestown. 19 Q. -- track and then what happened? 20 A. Okay. So we get to Jamestown. We 21 stop. We secure our cars. We follow the inbound 22 train procedure to secure the cards -- cars and do 23 our securement and safety tests and all that kind of 24 thing, the normal kind of process. 25 We also -- we had a briefing in the cab</p>

<p style="text-align: right;">Page 66</p> <p>1 track is lined up, I couldn't even see that.</p> <p>2 Q. If he's riding the point, would he ride</p> <p>3 on the engineer's side or on the conductor's side?</p> <p>4 A. Well, there were two of them so</p> <p>5 they're -- I would imagine one was on each side, but</p> <p>6 I don't know that for sure.</p> <p>7 Q. Would they have lanterns if it's --</p> <p>8 A. Yes.</p> <p>9 Q. -- 2:50 in the morning?</p> <p>10 A. Yes. They would have lanterns and</p> <p>11 radios. And be -- and they were both wearing their</p> <p>12 orange vests or some -- some orange.</p> <p>13 Q. But for -- at -- during the deposition</p> <p>14 today you don't recall actually seeing them out</p> <p>15 the -- when you looked in the mirror, you don't</p> <p>16 recall seeing a conductor on the riding point?</p> <p>17 A. The -- the track curves into the yard</p> <p>18 so I don't have any visibility of him. That's why</p> <p>19 they gave radio signals rather than hand signals.</p> <p>20 Q. And using the radio versus a lantern or</p> <p>21 hand signal is an appropriate safety measure?</p> <p>22 A. Yes.</p> <p>23 Q. All right. So they tell you back up 20</p> <p>24 cars. They're riding the point, but you can't see</p> <p>25 them. What happens next?</p>	<p style="text-align: right;">Page 68</p> <p>1 Q. And you could see them walking up to</p> <p>2 the cab on the conductor's side?</p> <p>3 A. Correct.</p> <p>4 Q. From your observations were they</p> <p>5 discussing with each other anything or just walking</p> <p>6 or what did you --</p> <p>7 A. No.</p> <p>8 Q. -- perceive of their interactions?</p> <p>9 A. They were just walking one ahead of the</p> <p>10 other.</p> <p>11 Q. Who was ahead?</p> <p>12 A. I don't remember.</p> <p>13 Q. And then they came up and came into the</p> <p>14 cab or did you meet them outside?</p> <p>15 A. They came up into the cab.</p> <p>16 Q. What did you guys talk about?</p> <p>17 A. They told me that the -- the switch</p> <p>18 looked funny or looked weird or some -- something</p> <p>19 along that lines.</p> <p>20 Q. Did you ask them what they meant by</p> <p>21 that?</p> <p>22 A. I did. And they said that there were</p> <p>23 spaces on both sides so they didn't know which way</p> <p>24 the switch was lined.</p> <p>25 Q. Had you worked in the Jamestown yard in</p>
<p style="text-align: right;">Page 67</p> <p>1 A. I went back just a few cars and</p> <p>2 Conductor Christianson called over the radio for a</p> <p>3 stop so I stopped the train.</p> <p>4 Q. Okay. What happened next?</p> <p>5 A. After a little bit of time Conductor</p> <p>6 Christianson asked me to pull the train ahead so...</p> <p>7 Or, yeah, I think -- but I believe it was ahead one</p> <p>8 car so I started moving ahead. Now, when you're</p> <p>9 going ahead the distance isn't as relevant because</p> <p>10 I'm protecting obviously at that point because I can</p> <p>11 see out the front windshield versus in a -- in a</p> <p>12 shoving movement the conductors are my eyes and ears</p> <p>13 'cause I don't have any visibility behind me.</p> <p>14 Q. Once they -- you went up ahead what you</p> <p>15 judged to be a car length or whatever that distance</p> <p>16 was, did they tell you -- did they then come up to</p> <p>17 the locomotive cab, Christianson and Carroll?</p> <p>18 A. They instructed me to stop so I</p> <p>19 stopped, and then I waited for the next instruction.</p> <p>20 And I didn't get one for a while so I walked over to</p> <p>21 the conductor's side of the -- of the cab and looked</p> <p>22 in the mirror there, and I saw the two of them</p> <p>23 working their way back up to the front so... It was</p> <p>24 taking them a while 'cause there was some snow and it</p> <p>25 was a little bit of a distance so...</p>	<p style="text-align: right;">Page 69</p> <p>1 the year previous to this incident?</p> <p>2 A. I don't know if I was -- if I</p> <p>3 specifically had worked in the Jamestown yard during</p> <p>4 the previous 12 months. I was qualified on the</p> <p>5 territory because I had been on the Jamestown sub</p> <p>6 during that time frame.</p> <p>7 Q. Were you familiar with the layout of</p> <p>8 the yard?</p> <p>9 A. I have basic familiarity, yes.</p> <p>10 Q. Do you know if the yard had been</p> <p>11 changed at any point during your time on the railroad</p> <p>12 with respect to the track layout or anything like</p> <p>13 that?</p> <p>14 A. Not in that area. I know they did some</p> <p>15 maintenance on some other yard tracks. And I don't</p> <p>16 remember if they added a track or lengthened a track</p> <p>17 or something possibly. I -- I don't remember as</p> <p>18 to -- I guess is the best answer there. I don't</p> <p>19 recall anything.</p> <p>20 Q. Okay. So this -- this yard track where</p> <p>21 you came into off the main, does that have a</p> <p>22 particular name that you refer to it or track number</p> <p>23 that you can recall?</p> <p>24 A. I've called it the yard lead before,</p> <p>25 but I don't know if that's an accurate definition.</p>

<p style="text-align: right;">Page 70</p> <p>1 Q. Okay. For today's purposes we'll call 2 that track where this incident occurred the yard 3 lead; is that okay? 4 A. Okay. 5 Q. All right. And do you have any 6 knowledge of any change in the layout of the yard 7 lead or any of its switches during any of your time 8 on the railroad since you became qualified as a 9 locomotive engineer? 10 A. I don't. 11 Q. So they told you that the switch looked 12 weird 'cause there were spaces on each side. Based 13 on your experience as a conductor and as an engineer 14 what did you take that to mean? 15 A. Well, I asked them -- I asked them if 16 we damaged the switch. And at first they didn't know 17 even if the switch was damaged. But they said, "No, 18 we stopped short of the switch." And I asked each 19 one individually multiple times, and each time they 20 told me the same thing, that we were stopped short of 21 it. 22 Q. All right. As a conductor if you don't 23 line a switch appropriately, is that a -- a big deal 24 on the railroad? 25 A. It can be. But, I mean, there are yard</p>	<p style="text-align: right;">Page 72</p> <p>1 you -- when they're explaining what they saw to you 2 before you go back are you thinking, Of all the 3 different things that could happen, one of the things 4 is maybe we went through the switch when it wasn't 5 lined appropriately? 6 A. I did. And that's why I asked them 7 that. And that's why they -- and they told me, like 8 I said on multiple occasions, that we stopped short 9 of the switch. 10 Q. And as they're continuing to explain 11 what occurred and it doesn't make sense, are you 12 thinking, Boy, maybe -- maybe we ran through the 13 switch? Is that getting to be more likely in your 14 mind? 15 A. Well, I have -- I have seen switches 16 that were damaged before. It doesn't -- I mean, I've 17 pulled up on switches that were damaged before. 18 I've -- you know, I've had situations where we've 19 been, you know, going along a main line track and -- 20 and the switch wasn't lined correctly or didn't line 21 properly or something as well so it's one possible 22 thing. It's -- it's a possibility, but it's not the 23 only possibility. 24 Q. After you talked to these guys and they 25 were kind of not able to give you a real solid</p>
<p style="text-align: right;">Page 71</p> <p>1 switches... There are yard switches that get run 2 through in Mandan probably on a monthly basis that it 3 isn't -- I mean, it's not unheard of. 4 Q. There could be big consequences if a -- 5 if a switch gets run through; a train could possibly 6 derail? 7 A. It could happen. It typically doesn't. 8 Q. All right. You talked to these guys. 9 They said that they thought they stopped short -- 10 A. Yep. 11 Q. -- and that -- but the switch had been 12 gapped on both sides. Did that make sense to you or 13 did you have concerns with what they were telling 14 you? 15 A. Well, I -- I wasn't sure -- you know, 16 with -- with their experience level, I wasn't sure if 17 they -- if the -- if the -- when they said that it 18 looked weird, I wasn't sure what exactly that meant. 19 And when I asked for more clarification on it, they 20 didn't explain it in a way that made sense from a -- 21 that I knew 100 percent what was going on standpoint. 22 So after they warmed up I decided to go back and look 23 at the switch myself and see if it was in fact 24 damaged and gapped and all those things. 25 Q. And when they're explaining it to</p>	<p style="text-align: right;">Page 73</p> <p>1 explanation, you decided to go back and look at 2 the -- the switch yourself? 3 A. Right. But what they didn't give me a 4 solid explanation on is what the switch looked like. 5 It was the explanation of what was weird about it 6 that I didn't have a good understanding of. They 7 were very clear in saying that we stopped short of 8 the switch. 9 Q. And then at that point do you call in 10 the switch or do you go look at it yourself? 11 A. At that point I put on my gear and the 12 three of us all went out to look at the switch. 13 Q. Why didn't you call it in as soon as 14 you had seen it -- or as soon as you heard of it? 15 A. Well, I -- because I didn't know if it 16 was actually damaged or not at that point. I wanted 17 to confirm it before I called in -- called it in. We 18 were already protecting the switch. Nobody else 19 could move over that switch 'cause our train was 20 parked on the lead. 21 Q. All right. So you put on your gear -- 22 that's your helmet, your reflective vest, probably a 23 jacket at that time of year -- 24 A. Yeah. 25 Q. -- and you make your way down to the</p>

<p style="text-align: right;">Page 74</p> <p>1 switch?</p> <p>2 A. There wasn't a helmet, but yes.</p> <p>3 Q. Okay. Where did you -- did you</p> <p>4 approach it the same direction, from the conductor's</p> <p>5 side?</p> <p>6 A. Yes. That was the safer side to walk</p> <p>7 on because the other side was closer to main.</p> <p>8 Q. All right. And when you got up to the</p> <p>9 switch then what did you see?</p> <p>10 A. Okay. So when I got up to the switch</p> <p>11 it was -- like they said, it was gapped on both</p> <p>12 sides. It was clearly damaged. And I asked them</p> <p>13 again if we did that damage or if we for sure stopped</p> <p>14 short of it, and they said again that they -- that we</p> <p>15 stopped short of it, each of them.</p> <p>16 Q. Did that make sense to you when they</p> <p>17 were telling you that or did you have questions about</p> <p>18 that?</p> <p>19 A. Well, it's very possible it could have</p> <p>20 been damaged before we got there. I don't know.</p> <p>21 Q. Well, do you have any information or</p> <p>22 documentation about any work in the yard that would</p> <p>23 have occurred before you guys encountered the switch</p> <p>24 on February 5th?</p> <p>25 A. I wouldn't have any knowledge of any</p>	<p style="text-align: right;">Page 76</p> <p>1 based on -- do you know what that was based on?</p> <p>2 A. I have no idea.</p> <p>3 Q. Do you know if that was based on his</p> <p>4 best knowledge at the time or do you know if he had</p> <p>5 done an investigation at that point?</p> <p>6 A. I -- I don't know. I -- my thought at</p> <p>7 the time was that he talked to somebody out there</p> <p>8 that had told him that --</p> <p>9 Q. All right.</p> <p>10 A. -- because he said he was sure that was</p> <p>11 what happened.</p> <p>12 Q. Do you know how switches get reported</p> <p>13 as damaged to the system interruption desk at all?</p> <p>14 A. I believe they get reported -- I think</p> <p>15 that's -- well, when we got back in the cab, we</p> <p>16 called the dispatcher and reported it. I would</p> <p>17 imagine that he then did something that reports it,</p> <p>18 but I am not sure how that process works.</p> <p>19 Q. Tell me about that. How do you call</p> <p>20 the dispatcher? Is that radio or a call -- cell</p> <p>21 phone?</p> <p>22 A. Either one. In this case we called on</p> <p>23 a cell phone.</p> <p>24 Q. What did you tell the dispatcher to the</p> <p>25 best of your recollection?</p>
<p style="text-align: right;">Page 75</p> <p>1 other trains or anything else that worked in that</p> <p>2 yard. I know that there were two locals that</p> <p>3 typically worked in that yard during the course of</p> <p>4 the day. But any number of trains could have gone in</p> <p>5 there for any number of reasons as well, and I</p> <p>6 wouldn't have any way to know that.</p> <p>7 Q. Do you know when the yard was last</p> <p>8 inspected before your incident?</p> <p>9 MR. SAYLER: Objection. Foundation.</p> <p>10 You can answer if you know, Mike.</p> <p>11 A. I don't know.</p> <p>12 Q. (Mr. Wells continuing) And do you know</p> <p>13 when the switch was last operated before your</p> <p>14 incident?</p> <p>15 A. I do not.</p> <p>16 Q. Anybody come up to you after the fact</p> <p>17 and say, "Jeez, Mr. Fink, I feel terrible. I screwed</p> <p>18 up the switch and I didn't report it"? Anything like</p> <p>19 that?</p> <p>20 A. Not till Trainmaster Schneider said</p> <p>21 that -- that maintenance of way had damaged it</p> <p>22 earlier.</p> <p>23 Q. And when did that conversation occur?</p> <p>24 A. When we arrived in Dilworth.</p> <p>25 Q. Do you know -- and -- and was that</p>	<p style="text-align: right;">Page 77</p> <p>1 A. I told him that the -- that we got to</p> <p>2 Jamestown to do our work and that the switch in</p> <p>3 Jamestown was damaged, and he told us to high --</p> <p>4 highball the work which means --</p> <p>5 Q. What's that?</p> <p>6 A. That means skip it. It's an old</p> <p>7 railroad term. If the ball -- you know, a highball</p> <p>8 means you don't need to stop. A lowball means you</p> <p>9 need to stop. So a highball would mean that you keep</p> <p>10 going.</p> <p>11 Q. Okay.</p> <p>12 A. At the time I reported to him what the</p> <p>13 conductors told me. But --</p> <p>14 Q. That you had stopped short and the</p> <p>15 switch --</p> <p>16 A. Yes.</p> <p>17 Q. -- looked gapped?</p> <p>18 A. I told him that -- that we had stopped</p> <p>19 short and that the -- that I went back and looked at</p> <p>20 the switch myself and the switch is damaged. But I</p> <p>21 don't have any way to -- I didn't say this to him,</p> <p>22 but of course I can't see back there what happened.</p> <p>23 I'm just relying on the conductors.</p> <p>24 Q. All right.</p> <p>25 A. And I did -- also that call was on</p>

<p style="text-align: right;">Page 90</p> <p>1 he was the conductor?</p> <p>2 A. No. Phil Miller was the engineer. I</p> <p>3 was the conductor. He was the brakeman that day.</p> <p>4 Q. Okay. And that was a case that</p> <p>5 Mr. Saylor represented Mr. Jurgens against BNSF?</p> <p>6 A. Yes.</p> <p>7 Q. All right. I have looked at your</p> <p>8 Complaint in this matter. Have you looked at the</p> <p>9 Complaint in this matter?</p> <p>10 A. No.</p> <p>11 Q. Okay. It's a pleading that's filed</p> <p>12 with the court. The Complaint says that you met with</p> <p>13 a claim rep who I understand is -- was that Tony</p> <p>14 Freidig?</p> <p>15 A. Yes.</p> <p>16 Q. And then it -- it says, He met with an</p> <p>17 attorney for BNSF. Do you remember who the attorney</p> <p>18 was for BNSF?</p> <p>19 MR. SAYLER: John, if you just want to</p> <p>20 clarify what time period you're talking about.</p> <p>21 Q. (Mr. Wells continuing) Well, let's</p> <p>22 talk about the period prior to your deposition.</p> <p>23 MR. SAYLER: Deposition in Jurgens?</p> <p>24 MR. WELLS: Yes.</p> <p>25 MR. SAYLER: Okay. Thanks.</p>	<p style="text-align: right;">Page 92</p> <p>1 A. I believe he was related to the</p> <p>2 attorney, Sweeney as well, and his law firm. I -- I</p> <p>3 don't know -- I don't know specifically. I met him</p> <p>4 one time.</p> <p>5 Q. All right. So you met with Mr. Rauser</p> <p>6 and Mr. Freidig in Mandan in the terminal there?</p> <p>7 A. Yes.</p> <p>8 Q. Rauser or whoever it was, but not</p> <p>9 Mr. Sweeney?</p> <p>10 A. Correct.</p> <p>11 Q. All right. And it was a different</p> <p>12 attorney than the person that took your deposition,</p> <p>13 and that was Mr. Sweeney?</p> <p>14 A. Correct.</p> <p>15 Q. Did you also speak with Mr. Jurgens'</p> <p>16 attorney prior to the deposition?</p> <p>17 A. Prior to the meeting with -- including</p> <p>18 Tony Freidig or prior to the deposition at the hotel?</p> <p>19 Q. Either.</p> <p>20 A. I met with him -- or not met with him.</p> <p>21 Excuse me. Had a conversation with him over the</p> <p>22 phone maybe the day before the deposition some -- in</p> <p>23 that time frame for probably 15 or 20 minutes.</p> <p>24 Q. And I have read the deposition</p> <p>25 transcript. That was a Mr. Tello. Was that who you</p>
<p style="text-align: right;">Page 91</p> <p>1 A. Okay. And the -- and the deposition</p> <p>2 with Jurgens -- at the deposition I believe was an</p> <p>3 attorney by the name of Sweeney maybe. But there was</p> <p>4 another attorney assigned to the case as co-counsel</p> <p>5 as well. He was the one I met with in Mandan with</p> <p>6 Tony Freidig.</p> <p>7 Q. Do you know who that was?</p> <p>8 A. I don't know his name.</p> <p>9 Q. Do you remember what he looked like?</p> <p>10 A. Sure, I -- he looks like an attorney.</p> <p>11 I -- I don't know.</p> <p>12 Q. Well, we're all cringing.</p> <p>13 A. He...</p> <p>14 Q. Was he a tall gentleman?</p> <p>15 A. Tall gentleman. White male. Older</p> <p>16 than me probably.</p> <p>17 Q. I think one of Mr. Sweeney's partners</p> <p>18 at the time was a gentleman named Scott Rauser. Does</p> <p>19 that name ring a bell?</p> <p>20 A. It could be. I don't remember his</p> <p>21 name.</p> <p>22 Q. Do you know if it was one of</p> <p>23 Mr. Sweeney's partners or employees or another</p> <p>24 attorney from -- from either the company or somewhere</p> <p>25 else?</p>	<p style="text-align: right;">Page 93</p> <p>1 met with?</p> <p>2 A. Yes, that's who I spoke with on the</p> <p>3 phone.</p> <p>4 Q. And did that meeting happen after this</p> <p>5 meeting with Tony Freidig and potentially Mr. Rauser?</p> <p>6 A. Yes.</p> <p>7 Q. When you met with -- in the</p> <p>8 pre-deposition meeting with Mr. Freidig and</p> <p>9 Mr. Rauser, what kinds of things did you talk about?</p> <p>10 A. He asked about kind of the events of</p> <p>11 the day basically.</p> <p>12 Q. Okay. What you observed of your</p> <p>13 co-worker when he was injured in this incident?</p> <p>14 A. Right. Which I did not observe him</p> <p>15 fall. I only observed him walking back to the cab</p> <p>16 and climbing into the engine.</p> <p>17 Q. Okay. And then you talked with</p> <p>18 Mr. Jurgens after the incident while you guys were in</p> <p>19 the locomotive cab as well?</p> <p>20 A. Yes. Phil Miller and I and he spoke,</p> <p>21 yes.</p> <p>22 Q. Okay. And what occurred during that</p> <p>23 meeting? You said you talked to them about the</p> <p>24 incident, but you said it's the primary basis for why</p> <p>25 we're here today.</p>

<p style="text-align: right;">Page 94</p> <p>1 A. I --</p> <p>2 Q. Connect those two for me, please.</p> <p>3 A. Okay. Well, I said that it was part of</p> <p>4 the reason that I was here today. The -- but the --</p> <p>5 the conversation that was in the cab was Mr. Jurgens</p> <p>6 saying that he had injured his knee when he was back</p> <p>7 protecting the shove essentially.</p> <p>8 Q. Okay. And what -- let's move forward</p> <p>9 in time to your conversation with the -- BNSF's</p> <p>10 outside attorney and -- and Mr. Freidig.</p> <p>11 A. Okay.</p> <p>12 Q. What happened in that meeting that you</p> <p>13 think brings us here today?</p> <p>14 A. Well, I -- part -- part of it was</p> <p>15 that -- I mean, initially he asked if -- when</p> <p>16 Mr. Jurgens arrived at work if he seemed to be having</p> <p>17 any problems with his knee. And I said, "No." He</p> <p>18 then pressed on it further and asked if it was</p> <p>19 possible that he had injured himself before he came</p> <p>20 to work that day. And I said, "I didn't see any sign</p> <p>21 of that." And then he said, "It would really help</p> <p>22 our case if you did see something like that." And I</p> <p>23 said, "Well, I didn't see something like that." And</p> <p>24 then he immediately asked me if I enjoyed working for</p> <p>25 BNSF.</p>	<p style="text-align: right;">Page 96</p> <p>1 knee brace?</p> <p>2 A. I don't know if he wore a knee brace or</p> <p>3 not.</p> <p>4 Q. Okay. We'd have to look at your</p> <p>5 deposition for that?</p> <p>6 A. I -- I'm -- I'm telling you today I</p> <p>7 have no idea whether he wore a knee brace or didn't</p> <p>8 wear a knee brace.</p> <p>9 Q. So you go to the deposition then and</p> <p>10 you testify that you didn't know if he had a -- any</p> <p>11 previous injury?</p> <p>12 A. Correct.</p> <p>13 Q. And then did you ever talk to this</p> <p>14 attorney again?</p> <p>15 A. No.</p> <p>16 Q. Did you ever talk to Tony Freidig</p> <p>17 again?</p> <p>18 A. No.</p> <p>19 Q. After that meeting -- and then at some</p> <p>20 point you testified at trial too; right?</p> <p>21 A. I -- I should clarify. I have talked</p> <p>22 to Tony Freidig since that meeting. Not specifically</p> <p>23 about this or anything case related. He talked to me</p> <p>24 at the Jurgens trial at one point, but it was more of</p> <p>25 a how's the weather kind of conversation. It wasn't</p>
<p style="text-align: right;">Page 95</p> <p>1 Q. And who said this? You're saying the</p> <p>2 outside attorney said this?</p> <p>3 A. That's correct.</p> <p>4 Q. All right. And from that you</p> <p>5 insinuated that he was trying to get you to give</p> <p>6 improper testimony?</p> <p>7 A. That's what it appeared to me, yes.</p> <p>8 Q. All right.</p> <p>9 A. That was -- that was the tone of the</p> <p>10 conversation.</p> <p>11 Q. All right. What year was this?</p> <p>12 A. I don't know. I'm sure it's in the</p> <p>13 records somewhere.</p> <p>14 Q. This is years -- years before this</p> <p>15 February 2019 incident?</p> <p>16 A. Yes. Or -- yeah.</p> <p>17 Q. All right. Do you know if Mr. Rauser</p> <p>18 was joking or being serious when he said this</p> <p>19 information?</p> <p>20 A. He didn't appear to be joking.</p> <p>21 Q. Do you know if Mr. Rauser had a basis</p> <p>22 in fact for questioning whether Mr. Jurgens had a</p> <p>23 preexisting knee injury?</p> <p>24 A. Not that he shared with me.</p> <p>25 Q. Did you testify that Mr. Jurgens wore a</p>	<p style="text-align: right;">Page 97</p> <p>1 a -- anything like that. And I also talked to him --</p> <p>2 I believe it was him -- related to an incident where</p> <p>3 my truck was hit in a parking lot by a skid-steer</p> <p>4 that was doing snow removal that was completely</p> <p>5 unrelated as well.</p> <p>6 Q. All right. And in either of those</p> <p>7 instances did Mr. Freidig say, "Yeah, I'd like to</p> <p>8 help you but, sorry, you testified unfavorably to</p> <p>9 us"?</p> <p>10 A. Well, the first one happened prior to</p> <p>11 testifying so there's no way he could have said that.</p> <p>12 The second one was at the courthouse, and it wasn't</p> <p>13 about anything that we were -- it wasn't -- it was</p> <p>14 just a how's the weather kind of casual conversation.</p> <p>15 Q. Mr. Freidig's never been rude or</p> <p>16 untoward to you in any way; has he?</p> <p>17 A. No, I have no issue with Mr. Freidig at</p> <p>18 all.</p> <p>19 Q. All right. This meeting with -- prior</p> <p>20 to your deposition where you say you felt like you</p> <p>21 were pressured to lie, was that meeting recorded at</p> <p>22 all?</p> <p>23 A. I don't believe so.</p> <p>24 Q. You don't have any recordings of it?</p> <p>25 A. I don't have any recordings, no.</p>

25 (Pages 94 - 97)

<p style="text-align: right;">Page 98</p> <p>1 Q. And you testified truthfully in your 2 deposition; correct? 3 A. Yes. 4 Q. You testified truthfully then in the 5 Jurgens trial? 6 A. Yes. 7 Q. Did anybody call you prior to the trial 8 and say, "Hey, Mr. Fink, this -- we really need your 9 help on this case and we need you to change your 10 testimony"? 11 A. No. 12 Q. After this conversation happened with 13 Mr. Freidig and the outside attorney, did you make 14 any complaints to anybody? 15 A. No. 16 Q. Did you tell your union, "Hey, I need 17 representation. These guys are pressuring me to tell 18 an untruth"? 19 A. No. 20 Q. Did you tell Mr. Tello, "Hey, these 21 guys prior to the deposition told me to tell an 22 untruth"? 23 A. I don't believe so, no. 24 Q. Did you make any complaints to anybody 25 else at BNSF that these -- this attorney apparently</p>	<p style="text-align: right;">Page 100</p> <p>1 that deposition that Mr. Jurgens had told you the day 2 of the incident that he had prior knee surgery or 3 replacement? 4 A. He did tell me that he had had surgery 5 on that knee previously, yes. 6 Q. And are you now testifying under oath 7 that an attorney affirmatively asked you to lie in a 8 deposition? 9 A. That was my impression. 10 Q. And that's more of your impression 11 rather than -- he didn't say, "I know you saw X, but 12 I want you to say Y"; right? 13 A. He did not say, "I know you saw X, but 14 I want you to say Y." 15 Q. He didn't say, "I know you don't know 16 about his preexisting injury, but I want you to say 17 he was injured"? 18 A. He did not say that, no. 19 Q. As an engineer do you have an 20 obligation to report dishonest conduct? 21 MR. SAYLER: Of BNSF attorneys? 22 Q. (Mr. Wells continuing) Well, of 23 anything dealing with your BNSF responsibilities. 24 MR. SAYLER: I don't know why there 25 would be a rule that he has to report the conduct</p>
<p style="text-align: right;">Page 99</p> <p>1 told you to lie at a deposition? 2 A. No. 3 Q. Did you complain to any of the bar 4 associations that an attorney pressured you to lie at 5 a deposition? 6 A. I wouldn't even know how to do that. 7 Q. Why not? Why -- why didn't you bring 8 it up to Mr. Jurgens' attorney? Why didn't you bring 9 it up to your union? Why didn't you tell anybody 10 that this really improper activity occurred? 11 A. When I pushed back on it, they changed 12 the line of questioning. 13 Q. Is it possible that they were trying to 14 determine what you knew about his preexisting 15 injuries, if any? 16 A. I had already answered that question 17 twice to him. 18 Q. And have you -- did you -- you said you 19 reviewed the trial transcript testimony prior to this 20 deposition. Did you also review the deposition 21 transcript testimony prior to this deposition? 22 A. I don't -- yeah, probably, yes. 23 Q. All right. 24 A. I read through it. 25 Q. And did you see that you testified in</p>	<p style="text-align: right;">Page 101</p> <p>1 of -- 2 Q. (Mr. Wells continuing) I'm just asking 3 if you're aware of the rule. 4 MR. SAYLER: -- BNSF attorneys so... 5 Q. (Mr. Wells continuing) Mr. Fink, are 6 you obligated to report dishonest conduct that you 7 observe? 8 A. Tony Freidig was in the room too so 9 who -- I mean... 10 Q. Well, okay. Did you report dishonest 11 conduct on Tony Freidig's behalf? 12 A. I didn't report dishonest contact to 13 anyone at BNSF. BNSF was already involved in the 14 meeting. 15 Q. And is that something you're supposed 16 to do if you observe dishonest conduct of any BNSF 17 employee or officer? 18 A. I suppose, yes. 19 Q. All right. Being deposed is kind of 20 stressful; is that right? 21 A. Yes. 22 Q. Kind of have your hackles up or be 23 anxious about the process; is that fair? 24 A. Yes. 25 Q. Prior to Mr. Jurgens' deposition had</p>

<p style="text-align: right;">Page 102</p> <p>1 you ever been deposed before?</p> <p>2 A. No.</p> <p>3 Q. Is it possible that your perception of</p> <p>4 what Mr. Rauser was asking you was different than</p> <p>5 what actually happened?</p> <p>6 A. I doubt it.</p> <p>7 Q. Okay. Why?</p> <p>8 A. 'Cause I was in the room. I heard the</p> <p>9 tone in his questions. And when I didn't give him</p> <p>10 the answer he was looking for, he immediately asked</p> <p>11 me if I enjoyed working for BNSF, which I thought</p> <p>12 was -- I took as a subtle threat.</p> <p>13 Q. Okay. And again this happened at least</p> <p>14 a year prior to this February 2019 incident?</p> <p>15 A. Yes. It would have been...</p> <p>16 MR. SAYLER: For the record, I think</p> <p>17 the deposition is October of 2018 so...</p> <p>18 A. Okay. It would have been before that</p> <p>19 even significantly.</p> <p>20 Q. (Mr. Wells continuing) All right.</p> <p>21 Let's shift gears here. Your Complaint talks about</p> <p>22 an incident near Hettinger, South Dakota, where there</p> <p>23 was an issue with a coal train. Hettinger is in</p> <p>24 North Dakota; right?</p> <p>25 A. No.</p>	<p style="text-align: right;">Page 104</p> <p>1 A. No.</p> <p>2 Q. Were you -- why was it being discussed</p> <p>3 in the safety marathon to your recollection?</p> <p>4 A. Because there were -- there was a</p> <p>5 concern that that could happen on other trains so</p> <p>6 people should be aware of that and secure the</p> <p>7 rear end of the train that's not connected to the</p> <p>8 locomotive head.</p> <p>9 Q. Okay. And who do you recall</p> <p>10 participating in the safety marathon with you? Was</p> <p>11 this at Mandan?</p> <p>12 A. This would have been at Mandan. We did</p> <p>13 safety marathons on a fairly regular basis. I can't</p> <p>14 tell you who was in the room with me. It would have</p> <p>15 been whoever happened to go on duty about the same</p> <p>16 time as me or who was part of my crew. And then the</p> <p>17 people running the safety marathon, whoever was</p> <p>18 scheduled for that particular time frame throughout</p> <p>19 the day.</p> <p>20 So the way that works is you might have</p> <p>21 a crew or two crews or a yard shift or whoever</p> <p>22 happens to go on duty at that time would go in and</p> <p>23 get the safety briefing for the safety -- excuse</p> <p>24 me -- for the safety marathon. And then -- and</p> <p>25 they -- there's a log, the -- so you could look back</p>
<p style="text-align: right;">Page 103</p> <p>1 Q. Okay. What is the incident near</p> <p>2 Hettinger, South Dakota, that you're talking about?</p> <p>3 A. I wasn't part of that train crew.</p> <p>4 Q. Do you have any personal knowledge</p> <p>5 about what the allegation in your Complaint about</p> <p>6 Hettinger, South Dakota, is?</p> <p>7 A. Okay. The Hettinger, South Dakota,</p> <p>8 train incident was part of a safety marathon where it</p> <p>9 was discussed that the train went into emergency</p> <p>10 because it broke in two. And the front end -- the</p> <p>11 head end of the train went into emergency and the</p> <p>12 rear end did not, and then the rear end of the train</p> <p>13 the air bled off and rolled back unprotected</p> <p>14 acrost -- acrost railroad crossings and things like</p> <p>15 that. But I was not part of that train crew.</p> <p>16 Q. This was just something you had heard</p> <p>17 about in a safety marathon?</p> <p>18 A. Right.</p> <p>19 Q. When did that safety marathon occur?</p> <p>20 A. I don't know the date of it.</p> <p>21 Q. In a safety marathon were you told</p> <p>22 about any root causes or reasons why the break-apart</p> <p>23 occurred?</p> <p>24 A. Why the -- why the train broke apart?</p> <p>25 Q. Yeah.</p>	<p style="text-align: right;">Page 105</p> <p>1 to the log to see who participated in that safety</p> <p>2 marathon.</p> <p>3 Q. All right. And why was it -- as far as</p> <p>4 trying to prevent it, what -- what did it have to do</p> <p>5 with this -- the air brakes or anything like that to</p> <p>6 your recollection?</p> <p>7 A. Because it was related to the same</p> <p>8 issue with the control valves that were not being</p> <p>9 properly maintained.</p> <p>10 Q. How so?</p> <p>11 A. Because the entire train didn't go into</p> <p>12 emergency which is what should happen if the control</p> <p>13 valves are operating properly.</p> <p>14 Q. Okay. Previously you talked about an</p> <p>15 inbound inspection rule --</p> <p>16 A. Yes.</p> <p>17 Q. -- put into place you said sometime in</p> <p>18 early February 2019.</p> <p>19 A. Yes.</p> <p>20 Q. Was it your testimony that this inbound</p> <p>21 inspection protocol was put in place to address those</p> <p>22 air brake control valve issues?</p> <p>23 A. That is what we were told. But in fact</p> <p>24 the inbound air brake -- or the inbound inspection</p> <p>25 rule being applied on outbound trains would actually</p>

<p style="text-align: right;">Page 106</p> <p>1 mask the issue, not resolve the issue. So it would 2 prevent the crew members from knowing whether or not 3 the air brakes were functioning properly as opposed 4 to the previous method where you could determine that 5 the -- the control valves on certain cars were not 6 operating properly and then they could be set out and 7 repaired.</p> <p>8 Q. All right. So the previous method, 9 would we call that the outbound inspection method?</p> <p>10 A. Yes.</p> <p>11 Q. Can you walk me through the --</p> <p>12 A. Or -- or Class --</p> <p>13 Q. I'm sorry.</p> <p>14 A. It would be a Class 1 inspection.</p> <p>15 Q. Class 1 air brake inspection?</p> <p>16 A. Yes.</p> <p>17 Q. Can you walk me through the steps of a 18 Class 1 air brake inspection? And then the next 19 question -- or maybe you can do it at the same time, 20 but then I'm going to ask you to go through what an 21 inbound inspection is and -- and why they're 22 different in your mind.</p> <p>23 A. Sure. And it has been three years 24 since I've done one so I'll give you the -- the 25 general outline. It's also in the air brake and</p>	<p style="text-align: right;">Page 108</p> <p>1 that?</p> <p>2 A. There is a gauge, but I don't know that 3 the gauge is used on every single piston. Once 4 you've done a handful of them, you can see that 5 piston distance is, you know, significant or it's not 6 -- it's -- it's usually all the way out or all the 7 way in. It's not usually somewhere in between. If 8 it's somewhere in between, then that would be a 9 problem.</p> <p>10 So -- so as you're either walking -- or 11 in the carmen's case, they -- they ride. Or you can 12 also potentially do it from a van or utility vehicle 13 of some sort as well. But the -- the key to it is to 14 look at every -- each individual brake and make sure 15 that that brake is set properly.</p> <p>16 And once you have confirmed that, then 17 you do a release on it, and then you would again look 18 at each individual brake and make sure the release 19 was proper as well. There's a step-by-step -- like I 20 said, a step-by-step process in the -- in the air 21 brake and train handling rules.</p> <p>22 So in addition to that, at the same 23 time you're looking for other general safety things 24 not related to air brakes as well. Like, for 25 example, a -- a piece of metal hanging off the side</p>
<p style="text-align: right;">Page 107</p> <p>1 train handling rules that are provided to everyone as 2 well, all the steps of them. But the --</p> <p>3 Q. Best of your recollection is fine, sir.</p> <p>4 A. Okay. The Class 1 inspection would 5 start with releasing the brakes so that all the air 6 brakes were released -- or having the brakes 7 released. And then setting a 20-pound air brake set 8 as indicated by the rear of the train which would be 9 either a -- a rear end device or a distributed power 10 unit.</p> <p>11 The -- then what would happen is a 12 carman and/or conductor or whoever was performing the 13 inspection would walk or ride or somehow view each 14 brake on each car all the way throughout the train 15 and make sure that that brake set properly. The 16 requirement coming out of an originating terminal 17 like Mandan would be that you have a hundred percent 18 of those brakes set properly.</p> <p>19 Q. And are you looking to make sure that 20 the piston comes back out?</p> <p>21 A. Right. You're looking to see how -- 22 that the piston travels the -- the correct distance 23 for the car. Which I don't remember the exact 24 distance anymore at this point but...</p> <p>25 Q. Do you have a gauge to help you with</p>	<p style="text-align: right;">Page 109</p> <p>1 of a car or, you know, a strap that's broken or 2 something like that that might cause a problem down 3 the road -- or down the track as well so... Go 4 ahead.</p> <p>5 Q. The carman or the -- or the conductor 6 or whoever is doing the air brake test is looking for 7 anything bent, broken or missing as far as safety 8 appliances; right?</p> <p>9 A. Correct.</p> <p>10 Q. Okay. So that's the general overview 11 of the Class 1 air brake that we're calling the 12 outbound method?</p> <p>13 A. Uh-huh.</p> <p>14 Q. What's the inbound method?</p> <p>15 A. So the inbound method is to -- rather 16 than -- well, and I guess there's -- there's another 17 part to that too in that you could -- you would put a 18 train into emergency and make sure that it goes into 19 emergency throughout the entire train. But --</p> <p>20 Q. Something you need every time you do an 21 outbound air brake test?</p> <p>22 A. No, it's not.</p> <p>23 Q. Okay. Another option?</p> <p>24 A. Another option, yes. So the -- the 25 inbound inspection rule requires you rather than to</p>

<p style="text-align: right;">Page 110</p> <p>1 set the 20 pounds to see if it -- if it -- if the 2 brakes set, when you release the brake instead you 3 release to a -- a service level or you release the 4 air in the cars all the way down to zero, which is a 5 slower release as opposed to an emergency release 6 which is easier for the control valves to handle but 7 it's not testing their capabilities then. 8 So then if you do that in conjunction 9 with your air brake test instead of doing the full 10 Class 1 the correct way, what happens is you don't 11 find out that there are certain cars that aren't 12 either setting or releasing brakes correctly because 13 it's a slower release. 14 Q. Okay. Got it. And you were told to do 15 this on February 5th when you got to Mandan? 16 A. Yes. That's the next time I worked 17 after the rule was put in place. 18 Q. It was -- whether it was February 4th 19 or 5th, it was the beginning of your shift before the 20 switch was run through? 21 A. Correct. 22 Q. Or the switch incident? 23 A. Yep. 24 Q. Okay. So it was the beginning of that 25 shift was the first time you were told about it?</p>	<p style="text-align: right;">Page 112</p> <p>1 morning, yes. 2 Q. And what did -- what did -- did you 3 talk with Road Foreman Selzler? 4 A. Yes, I did. 5 Q. What did you talk about? 6 A. We talked about the inbound inspection 7 rule. 8 Q. What did he say? 9 A. And -- and I explained to him my 10 concerns about it being a safety issue because crews 11 will not know if their train is properly going into 12 emergency braking or not when they leave the yard by 13 following that procedure which is designated 14 specifically to be an inbound inspection, not an 15 outbound inspection. 16 Q. And what did he say in response? 17 A. He disagreed with me, and we had a 18 conversation about it. And -- and -- and -- sorry. 19 My dog doesn't like the question apparently. 20 Q. We can take a quick break and deal with 21 him quick. 22 A. Sure. 23 Q. Okay. We can go off the record. 24 A. Okay. 25</p>
<p style="text-align: right;">Page 111</p> <p>1 A. Correct. 2 Q. And you were told to take it up with 3 Selzler? 4 A. Yep. 5 Q. And it's the middle of the night 6 probably so you didn't connect with Selzler that 7 night? 8 A. Correct. 9 Q. Did you follow up with him after this 10 incident? 11 A. Yes. I spoke with him when I was in 12 Trainmaster Schneider's office. After Mr. Schneider 13 had said that -- that he thought maintenance damaged 14 the switch, I asked him about the inbound inspection 15 rule. He'd be a trainmaster rather than a 16 yardmaster, but he's not engine qualified so he 17 didn't really understand it that well so he also 18 referred me to Road Foreman of Engines Selzler -- 19 Selzler who then I -- then he called for me on his 20 cell phone. 21 Q. When did he call you on his cell phone? 22 A. No. Trainmaster Schneider called Road 23 Foreman of Engines Selzler on Schneider's phone. 24 Q. Right while you were there that night? 25 A. While we were there in his office that</p>	<p style="text-align: right;">Page 113</p> <p>1 (Off the record from 2:47 p.m. to 2 2:48 p.m.) 3 Q. (Mr. Wells continuing) So you -- I 4 think at the time the dog started barking you were 5 explaining that Mr. Selzler was saying he disagreed 6 with your assessment? 7 A. Yes. 8 Q. Do you know why he disagreed with your 9 assessment? 10 THE WITNESS: Will you get the dog? 11 Take the dog. 12 A. He -- he said that you could still do 13 the emergency test, and that how you would do the 14 emergency test would be to essentially cut off the 15 air brake valve between the engines and the first car 16 and then put the head end into emergency and see if 17 the rear end of the train went into emergency as 18 well. 19 And what I had told him at the time is 20 that there's a radio signal that goes between the 21 head end and the rear end of the train that will 22 automatically put the rear end of the train into 23 emergency if I create a manual emergency at the head 24 end. 25 And I told him the better test would be</p>

<p style="text-align: right;">Page 134</p> <p>1 Q. (Mr. Wells continuing) Well --</p> <p>2 MR. SAYLER: -- give you a percentage,</p> <p>3 but go ahead and ask --</p> <p>4 Q. -- would the --</p> <p>5 MR. SAYLER: -- again I guess.</p> <p>6 Q. (Mr. Wells continuing) -- brakes still</p> <p>7 apply when the train's put into emergency?</p> <p>8 A. I'm sorry. I didn't catch that.</p> <p>9 Q. Would the brakes still apply when the</p> <p>10 train's put into emergency, this inbound protocol is</p> <p>11 used?</p> <p>12 A. The inbound protocol does not create a</p> <p>13 bigger problem. It masks a problem if it exists.</p> <p>14 Q. And if a problem exists, is your</p> <p>15 testimony that the train would not be able to go into</p> <p>16 emergency at all?</p> <p>17 A. My experience is that a train does --</p> <p>18 that a train would only partially go into emergency</p> <p>19 instead of completely going into emergency, which is</p> <p>20 an unsafe condition.</p> <p>21 Q. What is that experience? Tell me about</p> <p>22 that.</p> <p>23 A. Okay. I was on a coal load, for</p> <p>24 example, headed to Dilworth. I was working with -- I</p> <p>25 can't think of the name of the conductor right now.</p>	<p style="text-align: right;">Page 136</p> <p>1 A. No. This was a -- this was a scenario</p> <p>2 where when we got on the train we were told all the</p> <p>3 inspections were done and that we were to take it out</p> <p>4 of the yard.</p> <p>5 Q. All right. So this was after your</p> <p>6 February 5th incident. I think the Complaint says</p> <p>7 it's February 10th so just a few days after --</p> <p>8 A. Yep.</p> <p>9 Q. -- your incident. And by that time you</p> <p>10 hadn't adopted your modified test protocol?</p> <p>11 A. I -- I only did that when I was in</p> <p>12 charge of the air brake testing.</p> <p>13 Q. All right. And what did you do in</p> <p>14 response to that situation occurring once you got</p> <p>15 the -- the train secured? Did you call it into the</p> <p>16 mechanical desk? Did you call the road foreman?</p> <p>17 What did you do with that information?</p> <p>18 A. We notified the dispatcher. Road</p> <p>19 Foreman Selzler as well. Had conversations with him</p> <p>20 as well. And at that point I also reported it to the</p> <p>21 Federal Railroad Administration who told me that they</p> <p>22 would be in contact with Mr. Selzler to get more</p> <p>23 information.</p> <p>24 Q. All right. And how did you report it</p> <p>25 to the FRA?</p>
<p style="text-align: right;">Page 135</p> <p>1 I'll try to remember it as we go on. Working on a</p> <p>2 coal load from Mandan to Dilworth. The -- these</p> <p>3 inspection -- and this was probably a week after my</p> <p>4 conversation with Selzler in Trainmaster Schneider's</p> <p>5 office.</p> <p>6 And we proceeded eastbound. When we</p> <p>7 got to the west end of Jamestown, the rear of the</p> <p>8 train went into emergency and only part of the cars</p> <p>9 went into emergency because the -- there was a</p> <p>10 defective brake valve in the train that resulted in</p> <p>11 all the cars ahead of that car not going into</p> <p>12 emergency versus all of the cars going into emergency</p> <p>13 like would happen in a proper emergency braking</p> <p>14 instance.</p> <p>15 Luckily it was the head end of the</p> <p>16 train that I was controlling as opposed to the rear</p> <p>17 end of the train which would have been completely</p> <p>18 uncontrolled in that -- in the opposite scenario so I</p> <p>19 was able to stop the head end of the train using a</p> <p>20 combination of dynamic braking and a full-service</p> <p>21 reduction. But the head end of the train did not go</p> <p>22 into emergency.</p> <p>23 Q. And was this a scenario where you could</p> <p>24 have done your modified emergency test plus your</p> <p>25 additional test?</p>	<p style="text-align: right;">Page 137</p> <p>1 A. I took -- I spoke with the local FRA</p> <p>2 representative and provided him information on it.</p> <p>3 Q. Who was that; do you recall?</p> <p>4 A. I do not remember his name. I could</p> <p>5 find out for you.</p> <p>6 Q. Did you speak with him on the phone or</p> <p>7 did you send him an email or how -- how did that</p> <p>8 occur?</p> <p>9 A. I met with him in person.</p> <p>10 Q. Where did you meet?</p> <p>11 A. I don't remember exactly where</p> <p>12 we met. I think it was outside a movie theater.</p> <p>13 The Grand Theatre in Bismarck maybe.</p> <p>14 Q. Why did you meet him there?</p> <p>15 A. That's where he happened to be --</p> <p>16 Q. Oh, you called him --</p> <p>17 A. -- at the time that I called him.</p> <p>18 Q. -- on the phone and he said, "Hey, I'm</p> <p>19 in town. Let's -- I'm right over here," and you</p> <p>20 said, "Hey, I can get there"?</p> <p>21 A. Yep. So we talked in the parking lot.</p> <p>22 Q. Okay. I thought I was dealing with</p> <p>23 some kind of a --</p> <p>24 A. Actually now that I think about it, it</p> <p>25 wasn't --</p>

<p style="text-align: right;">Page 194</p> <p>1 nothing's there to stop them; is that fair?</p> <p>2 A. Right. Right. Yeah, if -- well, if</p> <p>3 they don't have air, they'll stop. The -- the --</p> <p>4 Q. No, I'm sorry.</p> <p>5 A. -- control valve would --</p> <p>6 Q. Other way around.</p> <p>7 A. Yes. The control -- the control valve</p> <p>8 is there to create an emergency release of air. So</p> <p>9 if -- you know, in your example if one of the brake</p> <p>10 valves in the middle of the train wasn't working,</p> <p>11 half of the cars either way the brakes would not set</p> <p>12 and you would have the same problem as I described,</p> <p>13 that the train would not properly stop in an</p> <p>14 emergency situation.</p> <p>15 Q. Is that a critical safety issue?</p> <p>16 A. That is absolutely a critical safety</p> <p>17 issue.</p> <p>18 Q. Is that a huge safety issue not just</p> <p>19 for railroad workers but for the public as well?</p> <p>20 A. Yes, that's correct. In fact if -- if</p> <p>21 it happens to be the -- if the -- the break or</p> <p>22 knuckle or break in the air hose or whatever causes</p> <p>23 the emergency brake application would occur on the</p> <p>24 head end of the train prior to wherever that valve</p> <p>25 was defective, the entire rear end of the train would</p>	<p style="text-align: right;">Page 196</p> <p>1 exaggerated I believe was the word that he used. And</p> <p>2 that he -- his recommendation for coming out of the</p> <p>3 investigation was going to be a written warning to</p> <p>4 Mr. Christianson and Mr. Carroll, and that his</p> <p>5 recommendation was going to be that I was completely</p> <p>6 exonerated because he didn't see any indication of</p> <p>7 dishonesty and he didn't see any rules that were</p> <p>8 violated within our -- within the investigation.</p> <p>9 Q. That's all the questions I have, Mike.</p> <p>10 Thank you.</p> <p>11 A. Okay.</p> <p>12 Q. Mr. Wells probably has some for you.</p> <p>13 EXAMINATION</p> <p>14 BY MR. WELLS:</p> <p>15 Q. Just briefly about this so-called</p> <p>16 conversation you had with Mr. Keel. That was the day</p> <p>17 of the disciplinary hearing?</p> <p>18 A. That's correct.</p> <p>19 Q. And who besides you and the other</p> <p>20 operating crew and your union representatives were</p> <p>21 there?</p> <p>22 A. Mr. Keel.</p> <p>23 Q. Anyone else?</p> <p>24 A. No.</p> <p>25 Q. Was -- no other management employee was</p>
<p style="text-align: right;">Page 195</p> <p>1 essentially continue moving completely unrestricted</p> <p>2 and completely uncontrolled. So if you were going up</p> <p>3 a hill when that happened, that -- that half of the</p> <p>4 cars potentially within that -- that train could roll</p> <p>5 free wherever the grade of the track might take it.</p> <p>6 Q. And that would take -- that could</p> <p>7 potentially take it through railroad crossings, take</p> <p>8 it through towns; is that fair?</p> <p>9 A. Yes.</p> <p>10 Q. And that -- that's the same whether</p> <p>11 it's a coal car or a grain car or cars full of</p> <p>12 ethanol and chlorine; right?</p> <p>13 A. That's correct.</p> <p>14 Q. Okay. Just one last little question</p> <p>15 here. At the investigation hearing, after that was</p> <p>16 done did you have any discussions with Mr. Keel?</p> <p>17 A. Yes. Immediately following the</p> <p>18 investigation after the recording was -- was done and</p> <p>19 the investigation was completed, Mr. Keel talked to</p> <p>20 everyone that was involved in the investigation from</p> <p>21 a principal standpoint. So that would have been</p> <p>22 Mr. Christianson, Mr. Carroll, Phil Miller, Ben</p> <p>23 Fricke, Jeremy Blazer, Cordell Booke and myself.</p> <p>24 And at that time he indicated that</p> <p>25 these charges were -- and I don't remember --</p>	<p style="text-align: right;">Page 197</p> <p>1 there to overhear this?</p> <p>2 A. No. Mr. Schneider had already left.</p> <p>3 Q. All right. Did you guys --</p> <p>4 A. He was the only -- sorry.</p> <p>5 Q. Did -- did you guys talk amongst</p> <p>6 yourselves and say, "Boy, I can't believe Mr. Keel</p> <p>7 said that"?</p> <p>8 A. No. Which we were part of the</p> <p>9 investigation as well. We all had kind of the same</p> <p>10 opinion.</p> <p>11 Q. Do you have any documentation, text</p> <p>12 messages, correspondence with each other saying,</p> <p>13 "Boy, that went really well. Thanks for helping me</p> <p>14 during that investigation"?</p> <p>15 A. No.</p> <p>16 Q. "I think what Mr. Keel make -- said</p> <p>17 makes sense," anything along those lines?</p> <p>18 A. I -- I -- I do not. We had a</p> <p>19 conversation in the hallway after the -- after</p> <p>20 everyone was dismissed, but that was myself and</p> <p>21 Cordell Booke and Jeremy Blazer.</p> <p>22 Q. All right. And how -- this was just a</p> <p>23 two- -- two-, three-minute conversation or how long</p> <p>24 did it -- did he talk to you guys after the</p> <p>25 conference -- after the hearing?</p>